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No. 07-1421

In The
Supreme Court of the United States

CANON LATIN AMERICA, INC.,
Petitioner,

v.

LANTECH (C.R.), S.A.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONER'S REPLY BRIEF

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INTRODUCTION

Lantech contends that the Eleventh Circuit's decision below represented "the latest in a series of cases recognizing the settled threshold standard for anti-suit injunctions. . . ." [Opp'n at 7]. But the threshold standard is by no means "settled." As the Eleventh Circuit recognized below, "[n]ot all circuits adhere strictly to the requirement that the action in the enjoining court be dispositive of the action to be enjoined or that the claims in both actions be the same." [App. at 8a, n. 8]. The conflict in this case stems from the Eleventh Circuit's unworkable requirement that a party seeking an anti-suit injunction demonstrate that the claims before the foreign court are strictly identical to those pending in the enjoining court, and the First and Ninth Circuits' practical realization that such a requirement, especially in international contracts, must be relaxed if forum selection clauses are to have any meaning.

The facts of this case make it an ideal vehicle for the resolution of this conflict. A U.S. business enters into a contract with a foreign company which contains a forum selection clause designating the courts of Florida as the only location where all claims can be filed. When a dispute arises, the foreign party files a lawsuit in its home court, rather than in the contractually agreed-to forum. A more typical, modern business scenario could not be conceived.

The petition should be granted.

REASONS FOR GRANTING THE PETITION

I. THIS CASE PRESENTS A CLEAR CONFLICT OVER THE THRESHOLD STANDARD THAT PARTIES SEEKING AN ANTI-SUIT INJUNCTION MUST SATISFY

Lantech contends that "[a]t best, this case presents a question of the misapplication of a properly stated ruled of law which does not justify certiorari." [*Id.* (internal quotation marks omitted)]. By way of example, Lantech argues that the Ninth Circuit's decision in *Gallo* "applied the basic principles later adopted by the Eleventh Circuit to facts that were the opposite of this case." [*Id.*]. Lantech is wrong.

The Ninth and Eleventh Circuits did not apply the same "basic principles." The Eleventh Circuit recognized as much, noting that its finding that Canonlat failed to satisfy the threshold standards for obtaining an anti-suit injunction conflicted with similar rulings by the First and Ninth Circuits. [App. at 8a, n. 8]. *Gallo* offers a paradigmatic example of this conflict.

In *Gallo*, the Ninth Circuit found that the threshold requirement was satisfied where all of the "issues" raised in the foreign proceeding were also before the enjoining court. *E. & J. Gallo Winery v. Andina Licores, S.A.*, 446 F.3d 984, 991 (9th Cir. 2006). In sharp contrast, the Eleventh Circuit here ruled that Canonlat could not meet the threshold requirement because Lantech's Costa Rican lawsuit turned "on statutory rights that are unique to Costa Rica and that cannot be resolved by a judgment of the district court

on Canonlat's claims in Florida [App. at 8a-9a]." In so ruling, the Eleventh Circuit made clear that injunctive relief would only be available to those parties who could demonstrate that the claims pending in the foreign court were "strictly identical" to the claims filed in the enjoining court.

In a further attempt to blur the conflict between the Ninth and Eleventh Circuits, Lantech contends that the *Gallo* decision turned on the Ninth Circuit's "key factual finding" that the "very same contractual claims" were before the U.S. and Ecuadorian Courts. [*Id.* at 8]. Lantech attempts to contrast this with the facts here, where, it claims, Canonlat "conceded" that "[t]his case . . . has nothing to do with the substantive content of Costa Rican Law No. 6209." [*Id.* (ellipses in original)]. Lantech not only misreads *Gallo*, it misstates Canonlat's position regarding Law 6209 below.

Lantech misconstrues *Gallo* by confusing the clear distinction between "claims" and "issues." As *Gallo* made clear, while the claims pending before the U.S. court involved the same issues pending in the Ecuadorian court – *i.e.*, whether the parties' contract was enforceable – only the Ecuadorian lawsuit specifically involved a statutory claim under foreign law. *E. & J. Gallo*, 446 F.3d at 991. That is the very same scenario at issue here. Because *Gallo* did not involve the same claims before the foreign and enjoining courts, Canonlat's alleged concession – that Costa Rica's Law 6209 had nothing to do with the U.S. action [Opp'n at 9] – is irrelevant.

The First Circuit's ruling in *Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F.3d 11 (1st Cir. 2004), deepens the conflict here. Lantech mistakenly argues that *Quaak* "is just another application of the same standards to different facts." [Opp'n at 10]. But like *Gallo*, the First Circuit's decision in *Quaak* represents yet another interpretation of the meaning and application of the threshold standards for issuing an anti-suit injunction. The court of appeals recognized as much below, noting that while *Quaak* concluded that the threshold inquiry would be satisfied if the "parties and the claims are 'substantially similar,'" the Eleventh Circuit would require that they be identical. [App. at 8a, n. 8.]. Lantech adds that Canonlat is "not sure what *Quaak* means." [*Id.*]. Canonlat has never suggested any confusion over *Quaak's* meaning. [Pet. at 16-17]. It is apparent that the "substantially similar" standard adopted by the First Circuit in *Quaak* is at variance with the Eleventh Circuit's "strict identity" requirement and might represent a more relaxed version of the "similar issues" standard adopted by the Ninth Circuit in *Gallo*. Thus, if there is any "confusion," it is among the circuits as to the correct interpretation of the threshold standards for issuing an anti-suit injunction.

II. THE ELEVENTH CIRCUIT'S RULING DEVIATES FROM THE COURT'S WELL-ESTABLISHED PRECEDENT FAVORING THE ENFORCEMENT OF FORUM SELECTION CLAUSES IN INTERNATIONAL CONTRACTS

A. The Eleventh Circuit's Decision Below Threatens The Continued And Orderly Transaction Of International Business

Lantech dismisses the Court's decisions regarding forum selection clauses on the ground that they did not "address[] when it is appropriate to issue an anti-suit injunction to halt foreign proceedings." [Opp'n at 11]. Lantech misses the point. Though it acknowledged the existence of a forum selection clause here [App. at 2a-3a], the Eleventh Circuit did not heed *The Bremen's* warning against giving "far too little weight and effect" to such clauses. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 8 (1972). The court of appeals' complete disregard for the parties' choice of forum threatens the Court's well-established policy of enforcing such clauses and undermines the predictability of international commercial relationships. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516-17 (1974).

Lantech's contention that forum selection clauses have historically taken a backseat to the threshold standards for issuing an anti-suit injunction [Opp'n at 11, 13] is misleading. In *Gallo*, the parties' agreement to litigate in California played a prominent, if not dispositive, role in the Ninth Circuit's evaluation of the threshold factors. Andina argued that Gallo could not

meet the threshold test for an anti-suit injunction "because enjoining the Ecuador action would deprive it of its right to pursue its claims under Ecuadorian law." *E. & J. Gallo,* 446 F.3d at 991. The Ninth Circuit rejected Andina's claim because "to the degree that Ecuadorian law does apply, federal courts are capable of applying it to Andina's claims." *Id. Gallo's* assurance that federal courts are able to apply foreign law only makes sense in the context of enforcing a forum selection clause that designated the U.S. as the site of litigation.

In 1974, the Court noted that forum selection clauses were "an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction . . . ." *Scherk,* 417 U.S. at 516-17. Under the Eleventh Circuit's reasoning, a forum selection clause (or arbitration clause) would be unenforceable so long as a party can plead a claim wholly dependent on a country's specific statutory or common law. *See e.g. Roby v. Corp. of Lloyd's,* 996 F.2d 1353 (2d Cir. 1993).

The Eleventh Circuit has created a yawning gap in more than thirty years of precedent enforcing forum selection clauses in international business contracts. Lantech's only response is a promise that the sky will not fall. [Opp'n at 13].

B. The "Public Policy" Embodied By A Foreign, Protectionist Statute Does Not Trump A Freely Negotiated Forum Selection Clause

Lantech contends that "nothing remarkable" [Opp'n at 15] occurred here, because at least two domestic states have enacted statutes making forum selection clauses unenforceable, while three federal courts have refused to enforce such clauses on public policy grounds. [*Id.* at 14-15]. Conceding that the court of appeals never considered the parties' forum selection clause in its analysis, Lantech erroneously concludes that "[i]f the Eleventh Circuit had reached this issue, there would have been no reason for it not to have done the same." [*Id.* at 15].

In *The Bremen*, the Court noted that "in light of present-day commercial realities and expanding international trade we conclude that the forum selection clause should control absent a strong showing that it should be set aside." *The Bremen*, 407 U.S. at 15. Recognizing that "uncertainty will almost inevitably exist with respect to any contract touching two or more countries, each with its own substantive laws . . .," the Court explained in a later decision that forum selection clauses constituted "an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction." *Scherk*, 417 U.S. at 516.

Significantly, the Eleventh Circuit has previously followed the Court's directive, enforcing a forum selection clause in an international agreement. In

Lipcon v. Underwriters at Lloyd's, London, 148 F. 3d 1285, 1288 (11th Cir. 1998), a group of U.S. investors in Underwriters at Lloyd's filed suit in federal court for violation of U.S. securities laws. Although the Lipcons never signed an agreement containing choice of law and forum clauses in favor of England, for any dispute arising from the underwriting business, the court of appeals, in reliance on *The Bremen,* bound the Lipcons to the choice of law and forum clauses in the agreement. *Id.* at 1289, 1299. In reaching this conclusion, the Eleventh Circuit rejected the argument that the express venue provisions of, and public policy behind, the Securities Act of 1933 and the Securities Exchange Act of 1934 prohibited enforcement of the choice clauses. *Id.* at 1291-95. In so doing, the court of appeals acknowledged the Court's two main concerns in *The Bremen* and *Scherk:* "(1) ensuring 'the orderliness and predictability [that are] essential to any international business transaction," and (2) "furthering international comity." *Id.* at 1294 (internal citations omitted). *See also Diaz-Rosado v. Auto Wax Co.,* 2005 WL 2138794 (D.P.R. 2005) (explaining that "the fact that a Puerto Rico statute proscribes the applicability of forum selection clauses does not mean that the Court will automatically disregard the parties' freely negotiated contractual obligations . . . [a]ccordingly, [the] argument that Puerto Rico's public policy as set forth in Act 75 prohibits the enforceability of forum selection clauses lacks merit and does not prevent dismissal in this case.").

III. THIS CASE IS AN APPROPRIATE VEHICLE FOR RESOLVING THE CONFLICT AMONG THE CIRCUITS REGARDING THE THRESHOLD TEST FOR ISSUING AN ANTI-SUIT INJUNCTION

This case presents an ideal vehicle for certiorari because of the common set of facts it raises. Every day, companies around the world enter into written agreements that contain forum selection clauses. Those clauses are designed to afford the parties some measure of comfort and predictability. While many parties to such clauses honor their agreements to litigate (or arbitrate) in a particular forum, many others do not. Those who choose to violate those clauses will initiate costly litigation in other locations, further depriving the parties of the benefit of their original bargain. A similar fact pattern emerged in *Gallo* and even in *The Bremen,* where this Court enforced a forum selection clause requiring a U.S. party to settle its claims in London, as provided for in a written contract. Accordingly, the typical nature of the scenario presented here offers an ideal vehicle for resolving the dispute between the circuits regarding the threshold factors for obtaining an anti-suit injunction.

Lantech warns that review should be denied because of the "complex statutory framework of evolving Costa Rican law . . . ." [Opp'n at 15; *see also id.* at 18 (noting that "this case arises from a complicated factual and statutory background."). That Costa Rican law presents a moving target is all the more reason to grant review in this case; it highlights

why parties to international business contracts negotiate forum selection clauses in the first place. In deciding whether to adopt the Eleventh Circuit's "strict identity" requirement, or the more relaxed versions advanced by the First and Ninth Circuits, the Court need not need engage in a lengthy conflicts of law analysis. The Ninth Circuit in *Gallo* ruled on the enforceability of a wine-maker's entitlement to an anti-suit injunction, in light of Ecuadorian law, without engaging in a lengthy exposition of that country's law. Likewise, the Eleventh Circuit dissolved Canonlat's anti-suit injunction without conducting a protracted examination into Costa Rica's Public Law 6209. The Court here, in turn, disposed of *The Bremen* without engaging in a detailed comparison of U.S. and U.K. law.

Lantech further urges that review is inappropriate because "the Court would have to decide whether Canonlat carried its burden on the 'same parties' prong of the threshold test." [Opp'n at 16]. Review, in the first instance, would turn on the existence of a conflict among the circuits. In dissolving the anti-suit injunction, the Eleventh Circuit acknowledged that a conflict existed. [App. at 8a, n. 8 (noting a conflict between its ruling in this case and the First and Ninth Circuits)]. That conflict, according to the court of appeals, extended to the question of identity of the parties. [*Id.* (noting its disagreement with the First Circuit in *Quaak* which concluded "that the threshold inquiry is satisfied because the parties and the claims are 'substantially similar'")].

Next, Lantech contends that review would not be appropriate because "[t]he Costa Rican court did not

interfere with any domestic proceeding." [Opp'n at 16]. But Lantech knows that anti-suit injunctions are *in personam* and are not designed to "meddle" with the Costa Rican courts' jurisdiction. [App. at 27a-28a (*citing, Kaepa Inc. v. Achilles Corp.*, 76 F.3d 624, 627 (5th Cir. 1996)]. Here, Lantech specifically agreed to bring all of its claims in the courts of Florida. [App. at 2a-3a, 13a]. Consequently, the injunction in this case only targeted Lantech, as the party over whom the district court exercised *in personam* jurisdiction.

Lantech further maintains that "public policy" does not "support an injunction." [*Id.*]. What Lantech means to say is that Costa Rica's public policy does not support an injunction. U.S. public policy, which controls this discussion, favors a foreign anti-suit injunction to vindicate the parties' freely-negotiated forum selection clause. *The Bremen,* 407 U.S. at 15 (explaining that "[a] contractual choice-of-forum clause should be held unenforceable if enforcement would contravene *a strong public policy of the forum in which suit is brought,* whether declared by statute or by judicial decision.") (emphasis added). Lantech adds that "there is no conflict between this Court's general policy in favor of forum selection clauses and application of Costa Rican public policy." [*Id.* at 17]. Yet, the Eleventh Circuit disregarded the public policy articulated by the Court in the *The Bremen* that forum selection clauses are *prima facie* valid and should be enforced. *The Bremen,* 407 U.S. at 10.

Lantech's additional claim that Canonlat's bid for a foreign anti-suit injunction constituted a "third bite at the apple," taken after two Costa Rican courts invalidated the forum selection clause [*Id.*], misses the

point. The Costa Rican courts should never have passed on the validity of the forum selection clause in the first place, because the parties agreed that all of their claims would be brought in the courts of Florida.

Finally, Lantech fears that the district court's logic could lead foreign courts to "issue anti-suit injunctions against American courts" based on laws they find to be "distasteful." [Cpp'n at 18]. Lantech ignores the fact that an anti-suit injunction is not used to express disagreement over another country's laws, but to enforce, as in this case, private agreements among parties to litigate in a particular jurisdiction.

CONCLUSION

Petitioner requests that the petition for a writ of certiorari be granted.

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